IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 80 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE A.R.DAVE
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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BARODA COMMERCIAL CORPN. PVT. LTD.

Versus

COMMISSIONER OF INCOME TAX

Appearance:

1. INCOME TAX REFERENCE No. 80 of 1986

MR RK PATEL for Petitioner No. 1

MR AKIL QURESHI for MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE A.R.DAVE
and
MR.JUSTICE D.A.MEHTA

Date of decision: 24/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE A.R.DAVE)

At the instance of the assessee, the Income Tax Appellate Tribunal, Bombay Bench 'A' has referred to this Court, for its opinion, the following question of law under the provisions of sec.256(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

"Whether, on the facts and in the circumstances of the case the Tribunal was correct in holding that the expenditure incurred on the maintenance of Chanasma factory (a closed factory where no business is done) and the guest house expenses cannot be deducted u/s 109(i)(g)(4) for the purpose of determining the distributable income?"

2. Learned advocate Shri R.K. Patel has appeared for the applicant-assessee whereas learned advocate Shri Akil Qureshi has appeared for the revenue.

3. It is pertinent to note that this question has been referred to us by the Income Tax Appellate Tribunal, Bombay Bench. Initially, we had some doubt whether Gujarat High Court can have jurisdiction, but looking to the fact that the reference is very old, the learned advocates appearing for the assessee as well as the revenue have submitted that instead of going into technicalities of jurisdiction, they would abide by the opinion, which might be rendered by this Court, on the question referred to it as the assessee was initially assessed by the Assessing officer having his office at Baroda and office of the assessee was also at Baroda. In the circumstances, without going into the fact whether this court has jurisdiction to entertain this reference, we think it proper and in the interest of justice to answer the question referred to us so that the litigation, which is otherwise 14 years old, is not further procrastinated.

4. The assessee is a limited company which had actually distributed dividend of Rs. 67,000/- for the Assessment Year 1969-70 and Rs. 60,000/- for the Assessment Year 1970-71. The distributable surplus for the said assessment years was Rs. 95,728/- and Rs. 83,445/- respectively. Under the provisions of sec. 104 of the Act, the assessee company was supposed to distribute 90% of its distributable surplus as dividend. As the dividend declared was lesser than what was prescribed under the provisions of sec. 104 of the Act, the Assessing Officer had initiated proceedings under the Act and as he came to the conclusion that the provisions

of sec. 104 of the Act had been violated, he levied additional tax at the rate of 50% on the difference of distributable income. The said order passed by the Assessing Officer was challenged before the Appellate Assistant Commissioner. After hearing the assessee, the A.A.C. allowed the appeal and, therefore, the revenue filed an appeal before the Tribunal. The Tribunal set aside the order passed by the A.A.C. and directed him to decide the matter afresh after considering the directions given by the Tribunal. In pursuance of the said directions, the appeal was heard again by the A.A.C., who disposed of the appeal by allowing the same. Being aggrieved by the order passed by the A.A.C., the revenue once again filed an appeal which was partly allowed.

5. The main issue with which this court is concerned is with regard to the expenditure incurred by the assessee for the purpose of maintenance of a factory which the assessee had at Chanasma and maintenance expenses of a guest house maintained by the assessee. The revenue is of the view that the amount of expenditure incurred by the assessee for the purpose of maintenance of Chanasma factory and the guest house cannot be said to have been incurred for the purpose of the business and as such the said expenditure was not permitted to be deducted as business expenses.

6. We have heard learned advocate Shri R.K. Patel appearing for the assessee. He has submitted that the distributable income, as per the provisions of sec. 109(i)(g)(4) of the Act, ought to have been reduced by the expenditure which the assessee had incurred for the purpose of maintenance of Chanasma factory and the guest house as the said expenditure had been incurred for the purpose of the business. According to him, even if the said expenditure was not allowed as expenditure while computing the income chargeable under the head "Profits and gains of business or profession", the expenditure in question had been incurred for the purpose of business, and, therfore, the Revenue ought to have deducted the said amount of expenditure while arriving at the distributable income as defined under the provisions of sec. 109 of the Act.

7. Learned advocate Shri Patel has relied upon the judgment delivered in the case of CIT, Kerala v. Malayalam Plantations Ltd., 53 ITR 140 to substantiate his submission that the amount, which the assessee company had spent was for the purpose of its business. According to him, even though the expenditure was not allowable under the provisions of sec. 37 of the Act,

the expenditure which the assessee had incurred was for the purpose of the business and, therefore, looking to the provisions of sec. 109(i)(g)(4) of the Act, the said amount of expenditure ought to have been deducted from the gross total income while arriving at the figure of distributable income.

8. Learned advocate Shri Patel has also submitted that the amount of expenditure incurred by the assessee for the relevant assessment years was also very meagre. He has submitted that looking to the smallness of profit, the revenue ought not to have invoked the provisions of sec. 104 of the Act. So as to substantiate the said submission, he has relied upon the judgment delivered by the Hon'ble Supreme Court in the case of CIT, Bombay City v. Bipinchandra Maganlal & Co. Ltd, 41 ITR 290. According to him, the company, as a prudent businessman, thought it proper to incur the said expenditure in the course of the business and it was not proper on the part of the Assessing Officer to decide whether it was necessary for the assessee to incur the said expenditure. It has been submitted by the learned advocate that the Supreme Court has held in the case of CIT (Central), Calcutta v. Asiatic Textiles Ltd., 82 ITR 816, that the reasonableness or unreasonableness of the amount distributed as dividends or the expenditure incurred by the assessee company must be considered from the point of view of a prudent businessman and, therefore, even the Assessing Officer should look at the said factors as if he is a prudent businessman. According to the learned advocate, the Assessing Officer did not look at the expenditure from the point of view suggested by the Hon'ble Supreme Court and his conclusion that the expenditure incurred by the assessee was not justifiable was not correct. According to the learned advocate, the Assessing Officer was not right when he looked at the expenditure from the point of view of the revenue and without considering the facts of the case from the point of view of a prudent or shrewd businessman.

9. It has been lastly submitted by the learned advocate that the provisions of sec. 104 are penal in nature and while imposing any financial burden on the assessee under the said section, the Assessing Officer ought to have taken due care and he ought to have complied with the provisions incorporated in the said section strictly, as the burden lies on the revenue to prove that the conditions laid down have not been satisfied. It has been submitted by him that all relevant conditions incorporated in sec. 104 of the Act had not been duly complied with for the reason that,

though the assessee had incurred expenditure for the purpose of its business, the said amount of expenditure was not taken into account by the Assessing Officer while arriving at the figure of distributable income.

10. Thus, the learned advocate has submitted that the Tribunal was not justified in coming to the conclusion that the amount of expenditure incurred by the assessee could not have been deducted under the provisions of sec. 109(i)(g)(4) of the Act for the purpose of determining the distributable income.

11. On the other hand, learned advocate Shri Akil Qureshi appearing for the revenue has submitted that the Tribunal had correctly interpreted the provisions of sec. 104 and 109(i)(g)(4) of the Act. It has been submitted by him that the factory of the assessee at Chanasma has been closed down. For the purpose of maintenance of the said factory, the assessee had incurred some expenditure. Even for the purpose of maintenance of the guest house, the assessee had incurred some expenditure. He has vehemently submitted that in fact the business of the assessee had been closed down and, therefore, the amount of expenditure which the assessee had incurred could not have been treated as business expenditure. It has been submitted by him that continuation of a business is absolutely necessary to show that the assessee had incurred some expenditure for the purpose of its business. If there is no business, the assessee cannot spend any amount for the purpose of its maintenance. He has, therefore, submitted that by no stretch of imagination, the amount of expenditure incurred by the assessee for the purpose of maintenance of a factory or for the guest house could be deducted from the gross total income as per the provisions of sec. 109(i)(g)(4) of the Act.

12. We have heard the learned advocates at length and have also gone through the relevant orders passed by the Assessing Officer, the Appellate Assistant Commissioner and the Tribunal. We have also gone through the judgments cited by the learned advocates.

13. Upon perusal of the impugned orders, it is very clear that the assessee had discontinued its business. It is not in dispute that the assessee had incurred expenditure for the purpose of maintenance of a factory and a guest house. It is not in dispute that the business had been closed down. Even before the A.A.C., the representative of the assessee had frankly conceded

that the assessee was not doing any business as the factory had been closed down since long.

14. In view of the fact that the assessee company had closed down its manufacturing activity as well as the business, it could not have incurred any expenditure for the factory which was not being used for the purpose of manufacturing activity. It is also pertinent to note that the income which the assessee had derived from the building, which was occupied for the purpose of the manufacturing activity in the past when the assessee was doing business of manufacturing, was shown as "income from house property" and was also assessed as such by the Assessing Officer. The said position prevailed even before and after the assessment years in question.

15. For the sake of convenience, the relevant portion of the provisions of sec. 109(i)(g)(4) of the Act is reproduced hereinbelow :

"109. For the purposes of sections 104, 105 and 107A and this section,-

(i) "distributable income" means the gross total income of a company as reduced by -

xxx xxx xxx

(g) any expenditure actually incurred for the purposes of the business, but not deducted in computing the income chargeable under the head "Profits and gains of business or profession" being -

xxx xxx xxxx

(4) any expenditure claimed as a revenue expenditure but not allowed to be deducted as such and not resulting in the creation of an asset or enhancement in the value of an existing asset."

16. Upon perusal of the above-referred provision, it is very clear that the expenditure actually incurred for the purpose of the business, which is not deducted while computing the income chargeable under the head "Profits and gains of business or profession", is to be deducted from the gross total income for arriving at the distributable income. In the instant case, the assessee has submitted that the expenditure in question had been incurred for the purpose of the business. Looking to the

fact that the business of the assessee had been closed down and the factory building was not used for the purpose of business, by no stretch of imagination it can be said that the expenditure incurred by the assessee was for the purpose of the business.

17. Once it is held that the expenditure incurred by the assessee was not for the purpose of the business, the amount of expenditure cannot be taken into account or deducted from the gross total income for arriving at the "distributable income".

18. Looking to the above-referred factual and legal position, in our opinion, the Tribunal had rightly interpreted the provisions of sec. 109(i)(g)(4) while coming to the conclusion that the expenses incurred by the assessee could not have been deducted from the gross total income under the provisions of the said section for the purpose of determining the "distributable income."

19. In view of the said position, we answer the question referred to us in the affirmative, that is, in favour of the revenue and against the assessee.

The reference thus stands disposed of with no order as to costs.

(A.R. Dave, J.)

(D.A. Mehta, J.)

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